

STATE OF NEVADA
LOCAL GOVERNMENT EMPLOYEE-MANAGEMENT
RELATIONS BOARD

JOHN STRAHAN,

Complainant,

vs.

WASHOE COUNTY SHERIFFS'
SUPERVISORY DEPUTIES
ASSOCIATION,

Respondent.

ITEM NO. 554D

CASE NO. A1-045767

DECISION

For Complainant: Jeffrey A. Dickerson, Esq.

For Respondent: Michael E. Langton, Esq.

STATEMENT OF CASE

John Strahan ("Complainant"), an individual formerly employed by the Washoe County Sheriff's Office and formerly a member of the Washoe County Sheriffs' Supervisory Deputies Association,¹ brought the subject complaint on July 23, 2003 alleging that Washoe County Sheriffs' Supervisory Deputies Association ("Respondent" or "the Association") willfully and in bad faith breached its duty to represent Complainant against local government employer the Washoe County Sheriff's Office concerning its failure to arbitrate the dispute between it and Complainant.

On July 28, 2003, Respondent filed a Motion to Dismiss and Motion for Sanctions and Attorney's Fees. On August 1, 2003, Complainant filed an Opposition to Motion to Dismiss and Motion for Sanctions and a Motion for Continuance and Stay of Proceedings. An Order was entered by the Board requiring the parties to brief the stay issue pending the Complainant's

¹ According to the Board's records, this is Respondent's correct name, as opposed to the name showing in the caption of the complaint.

1 deployment overseas and requested "substantiation that complainant was put on formal notice
2 that the association would 'drop' the complainant's grievances."

3 The Board deliberated on the above-referenced matter on September 11, 2003 and denied
4 Respondent's Motion to Dismiss based on the lack of substantiation by Respondent concerning
5 the "dropping" of the Complainant's grievances. It granted a stay during Complainant's
6 deployment, scheduling the matter for a subsequent status check.

7 On January 7, 2004, noting that Respondent had not provided "substantiation that
8 complainant was put on formal notice that the association would 'drop' the complainant's
9 grievances prior to the written communication of March 19, 2003," the Board ordered
10 Respondent to answer the Complaint within 15 days.

11 Respondent filed its answer to the Complaint on January 23, 2004. Complainant filed a
12 Pre-Hearing Statement on April 19, 2004, and Respondent filed its Pre-Hearing Statement on
13 April 22, 2004. On August 2, 2005, the Board issued a Notice of Hearing on the Complaint.

14 A Hearing was held on October 19, 2005. At the outset of the hearing, Respondent made
15 a Motion for Summary Judgment, based on contentions of res judicata/collateral estoppel,
16 waiver, and election of remedies, grounded on Complainant's prior pursuit of matters against
17 Washoe County in Federal and State Court and the Association in State Court, as well as on the
18 renewed contention that the statute of limitations had run. RT 4-33. The Board denied said
19 motion. RT 33.

20 At the hearing, five witnesses testified: John Strahan (RT 34-87), May Prosser-Strong
21 (RT 88-120), Pat Dolan (RT 121-131), Mark Kilburn (RT 133-137), and John Spencer (RT 138-
22 147; RT 162).

23 At the close of hearing, Respondent renewed its Motion for Summary Judgment and
24 closing arguments were heard. RT 149-160. The parties declined the opportunity to submit
25 post-hearing briefs and the matter was taken under submission. RT 162.

26 ///

27 ///

28 ///

FACTUAL BACKGROUND/SUMMARY OF EVIDENCE

The Discipline and Grievance against Washoe County Sheriff's Office

Paraphrasing from Respondent's Exhibit 1, Complainant was disciplined on December 15, 1998 as follows:

1. Unbecoming Conduct, in violation of General Order 025.005: Operating a motorcycle without the proper endorsement, done willfully, arrogantly, and demonstrating an attitude of selective enforcement of the law. This conduct was found, by itself or in conjunction with the other disciplinary proceedings, to be a basis for demotion from sergeant deputy sheriff to deputy sheriff.
2. Willful Violation of State Law and Satisfactory Performance, Lack of Truthfulness, in violation of General Orders 025.006, 0.25.028, and 025.031: Filing false and notarized articles of incorporation, which show the wrong name and address of a director, and faxing the articles using an official facsimile machine. The conduct was found to be the basis for a two day suspension.
3. Association with ex-felon John "Jack" Vallerio contrary to prior restrictions (insubordination) and failure to report same, lack of truthfulness, in violation of General Orders 0.25.013, 0.25.28, 025.029, 025.031. This conduct was found, by itself or in conjunction with the other disciplinary proceedings, to be a basis for demotion from sergeant deputy sheriff to deputy sheriff.
4. Association with ex-felons through Blind Justice Motorcycle Club, without proper reporting, in violation of G.O. 025.013 and G.O. 025.028. This conduct was found to warrant a written reprimand.
5. Association with an ex-felon, without ascertaining his status, in violation of G.O. 025.013 and G.O. 025.028, warranting written reprimand.

The substance of Complainant's grievance was to deny the disciplinary conclusions or findings and to contend that even if true they do not warrant the discipline imposed. Respondent's Exhibit 4.

Other Litigation

On December 22, 1998, near the time he initiated the grievance, Complainant brought a civil rights lawsuit in Federal District Court, which, as subsequently amended, alleged violations of first amendment free association and fourteenth amendment due process, as well as defamation, against Washoe County and Richard Kirkland, Washoe County's sheriff at that time. Respondent's Exhibit 14. Washoe County and Kirkland brought a summary judgment motion, which was granted by Judge McKibben on March 1, 2001 on the grounds that Complainant's protected conduct was not a substantial or motivating factor in the discipline or wasn't a cause of

1 the discipline (i.e., there were unprotected grounds that supported the basis for the discipline),
2 and that the process available to Complainant under the collectively bargained agreement was
3 sufficient, noting also that Complainant had the option of proceeding before the EMRB. The
4 defamation claim was found not to in-and-of-itself implicate a federally protected right.
5 Respondent's Exhibit 15. Summary judgment was upheld on appeal on April 19, 2002.
6 Respondent's Exhibit 16.

7 On May 3, 2002, Complainant initiated a second federal district court proceeding, this
8 time only against Washoe County, asserting a breach of the collective bargaining agreement in
9 the refusal to arbitrate. Respondent's Exhibit 17. On August 6, 2005, Complainant amended the
10 complaint in this federal district court proceeding to assert a claim against PORAC (Police
11 Officers Research Association of California) claiming that it is a collective bargaining
12 organization, that Complainant was a member, and that "the union (sic) has failed to arbitrate the
13 matter." Respondent's Exhibit 18, ¶¶ 16-19. On December 15, 2002, Complainant further
14 amended the complaint to substitute Respondent for PORAC. Respondent's Exhibit 19.

15 Respondent's counsel purportedly wrote to Complainant's counsel on December 24,
16 2002, demanding that he dismiss the second federal district court proceeding with prejudice,
17 stating that Complainant's duty of fair representation claim against Complainant was time
18 barred, having arisen in 1998. Respondent's Exhibit 7. Respondent's counsel wrote
19 Complainant's counsel on March 19, 2003 stating that in 1998, Complainant was "on clear
20 notice that the association would not pursue the matter further... Inasmuch as over four years
21 have elapsed, there is nothing to be done at this juncture, nor that will be done." Respondent's
22 Exhibit 11/Complainant's Exhibit C.

23 Complainant voluntarily dismissed the matter without prejudice on January 23, 2003.
24 Respondent's Exhibit 20; Complainant's Exhibit B.

25 On May 6, 2005, Complainant brought a state court action in the Second Judicial District
26 against Washoe County and Respondent, stating claims against Washoe County and alleging,
27 *inter alia*, that Respondent willfully and in bad faith failed to represent Complainant or to
28 arbitrate the matter on his behalf. Noting that he had brought the subject proceeding but that this

1 "Board has vacated and refused hearings due to budget constraints," Complainant contended that
2 he "should thus be deemed to have exhausted that remedy as it is futile and thus no remedy at
3 all." Respondent's Exhibit 21.

4 On August 11, 2005, the Second Judicial District Court, Judge Steven Elliot granted
5 Washoe County's motion to dismiss the state court action, stating that Judge McKibben covered
6 the issue of the right to arbitrate in the first federal district court proceeding. The court found
7 that the state court action was therefore barred by *res judicata*. Although Respondent was not a
8 party to the proceeding in which Judge McKibben ruled, and indeed had not joined in the motion
9 to dismiss the state court action, Judge Elliot applied his order dismissing the state court
10 complaint to Respondent as well. Respondent's Exhibit 22, p. 5.

11 *Testimony At Hearing*

12 A. Testimony of John Strahan

13 John Vincent Strahan was first employed by the Washoe County Sheriff's Office on
14 August 26, 1985, and retired therefrom on July 17, 1999. RT 34, L1 15-23. Strahan was a
15 member of the Association when it broke away from the general association. He also served as a
16 negotiator of the Association's contract. RT 35, L1 2-20.

17 Strahan was demoted from Sergeant by Sheriff Kirkland, which demotion he and the
18 Association grieved—he by writing a letter and the Association through an "employee
19 representation service" employing May Prosser-Strong. RT 34, L 24 to RT 36, L 7. He was
20 disciplined December 18 or 19, 1998, and he sent off his grievance letter within 24 hours. RT
21 51, L20 to RT 52, L3.

22 Prosser-Strong's service was engaged to provide labor representation in the areas of
23 employee-management relations, contract negotiations, grievances, and arbitrations. RT 36, L1
24 10-15.

25 After Strahan wrote a letter to Kirkland, Kirkland responded that his grievance needed to
26 be split out into separate grievances. Prosser-Strong then wrote a letter to Kirkland. Strahan
27 believed the next step after his and Prosser-Strong's letter was for him to have a "sit-down" to
28 respond to the 7,000 page, seven month investigation of him. Strahan was prepared to respond

1 to the disciplinary matter. RT 36, L 19 to RT 39, L 9. The disciplinary matter concerned the
2 issue of Strahan's association with convicted felons. RT 39, LI 11-18.

3 Strahan was never given the opportunity to have the sit-down with Sheriff Kirkland. RT
4 40, LI 4-6. Subsequent attempts to get to that stage included calls by Strahan to the Association,
5 letters by May Prosser-Strong to Kirkland, Pat Dolan, and Assistant County Manager Reynolds.
6 Strahan also had communications with Lieutenant Spencer, the current president of the
7 Association. RT 40, L 7 to RT 41, L 12. Strahan has attempted without success to get a "sit-
8 down" with the current sheriff. RT 44, LI 15-24.

9 Strahan was pursuing his lawsuit in Federal Court as a separate track from the grievance
10 procedure. The federal lawsuit concerned his civil rights. Strahan never indicated that by
11 pursuing his federal proceeding he was giving up his grievance option. RT 41, L 20 to RT 43, L
12 15.

13 Although Strahan has retired, he does not view the matter as a dead issue. He would like
14 the opportunity to clear his name. He wants the Association to take steps to compel arbitration.
15 RT 45, L 11 to RT 46, L 22.

16 Strahan retired because he was demoted (to Deputy Sheriff) and relocated to a position in
17 which he was forced into a ninety mile commute. He suffered a reduction in pay. He was then
18 offered a job by a different employer and took it, retiring early, with reduced retirement pay and
19 loss of health insurance. RT 47, L 20 to RT 49, L 22; RT 82, LI 9-12. Strahan was never advised
20 by the Association of the reason his grievance was dropped. RT 50, LI 7-16.

21 Strahan ceased being a member of, and paying dues to, the Association when he retired in
22 1999. RT 52, LI 14-25. He continued in communication with his representative after he retired.
23 RT 54, L 23 to RT 55, L2. His last communication with May Prosser-Strong was July 2001. RT
24 55, LI 3-8.

25 May Prosser-Strong was in communication with Kirkland and Dolan about information
26 about setting up the arbitration and came up with a list of arbitrators in communication with
27 Reynolds. RT 54, LI 9-19.

28 ///

1 Strahan spoke to Kirkland's successor, Balaam, about processing Strahan's grievance
2 when the two were at Lake Tahoe around 2000-1. Balaam said they should allow the Federal
3 lawsuit to run its course. RT 56 L 16 to RT 57, L 7.

4 Strahan states that Prosser-Strong did not tell him in June of 2001 that "they" (the Legal
5 Defense Fund, her employer) would likely drop coverage because of the lawsuit. RT 70, LI 13-
6 17.

7 Strahan recalls reading Judge McKibben's decision granting the county summary
8 judgment on Strahan's civil rights complaint in March of 2001, in which decision the judge
9 noted Strahan's option of going before the EMRB. Strahan did not exercise that option at that
10 time because he was appealing the Federal Court decision, while at the same time trying to get
11 the grievance going. RT 71, L 8 to RT 73, L 25.

12 Strahan believes the Association doesn't like him, although nobody has come to him to
13 say as much. RT 77, L 4 to RT 78, L 1. However, he was told by Bob Towery, Reza
14 Mehmofakham, Bob Campbell, and Clyde Terrell, board members at the time, that they were
15 called into Kirkland's office and told that if they followed through with the grievance, they
16 would have to answer for that. RT 77, LI 8-23.

17 Strahan, while pursuing dual tracks, was only eliciting one remedy—restoration of his
18 position, backpay and benefits. RT 79, L 22 to RT 80, L 24. In addition, he was seeking
19 emotional distress damages and certain other damages in the Federal Court proceeding. RT 81,
20 L 19 to RT 82, L 4.

21 B. Testimony of May Prosser-Strong

22 Ms. Prosser-Strong doesn't have anything in her file that shows that the Association
23 decided not to pursue Strahan's matter, nor was there ever a time that she was told that her
24 services wouldn't be needed on Strahan's grievance, either by the Association, LDF or Strahan.
25 She believes his case was referred to Mark Kilburn, attorney, to compel arbitration. RT 93, LI 1-
26 20.

27 ///

28 ///

1 Once a matter is referred to LDF by the Association Board, the Board is out of the loop
2 unless and until LDF declines on coverage grounds, at which point it becomes the Association's
3 decision whether to carry it on. RT 93, L 14, RT 94, L 19.

4 Prosser-Strong was told in fact that LDF had withdrawn coverage "down the road at
5 some point." RT 95, L1 3-20. She was told that coverage was terminated because of the
6 complaint for breach of duty of fair representation before the EMRB. RT 95, L 21 to RT 96, L
7 14. She never informed Strahan that he would no longer be represented. RT 98, L1 4-6.

8 Prosser-Strong received a copy of Association Exhibit 6, a March 28, 2001 letter from
9 Association President Means to Strahan, responding to Strahan's March 20, 2001 letter,
10 Association Exhibit 5, requesting a status report of Association actions on behalf of Strahan. In
11 Exhibit 6, Means indicated that the Association had referred the matter out and it was not in the
12 Association's or its Board's hands. Exhibit 6 also noted that LDF had retained counsel to
13 compel arbitration. In response to receiving that copy, Prosser-Strong called LDF to find out the
14 status on compelling arbitration, so that she could set up the hearing. She heard back from Larry
15 Friedman, LDF administrator, on April 24, 2001 to the effect that the matter had not been
16 resolved and that LDF was considering the possibility of terminating coverage on the grounds
17 that civil actions pursued had rendered the matter meaningless. RT 98, L 24 to RT 100, L 19.

18 On Friedman's recommendation, Prosser-Strong called Mark Kilburn, reaching him on
19 May 8, 2001. Kilburn indicated that meetings had been set up with Strahan and his counsel
20 (Dickerson), which meetings counsel was unable to attend. Subsequently, in a call on June 5,
21 2001, Kilburn expressed a concern that given the lawsuit pending in Federal Court, there would
22 be "any basis to proceed to arbitration on." RT 101, L 1 to RT 102, L 13.

23 Prosser-Strong then received a call from Strahan, and she told him what Friedman told
24 her about LDF considering terminating coverage because of the civil case. At the end of the call,
25 Strahan was intending to call his attorney to have him talk to Mark Kilburn. Prosser-Strong also
26 told him that Kilburn was concerned that the civil case was addressing the same issue as
27 arbitration. RT 103, L1 6-25. Prosser-Strong didn't feel that Kilburn was "definite on anything,"
28 and she conveyed that impression to Strahan. RT 104, L1 1-6.

1 Prosser-Strong told Strahan to contact Friedman or Kilburn directly, because once the
2 matter was referred out to legal counsel, she was no longer in the loop. RT 104, L1 7-16.
3 Prosser-Strong did not hear from Strahan or Dickerson thereafter. RT 104, L 23 to RT 105, L
4 10.

5 On further query, Ms. Prosser-Strong indicated that the matter of Strahan's grievance was
6 not dropped in 1999 and was not dropped to her knowledge in 2001. She had gone as far as
7 selecting arbitrators, whom the department balked at having hear the case. RT 110, L1 2-25.

8 Prosser-Strong talked to Candace Bradley, LDF's Case Coordinator, in a second
9 discussion about coverage, about the time when the complaint was filed. RT 107, L 7 to RT 108
10 L 22; RT 111, L 21 to RT 112, L 3.

11 Captain Means, President of the Association, made an attempt to talk to Kirkland or Pat
12 Dolan to move the matter to arbitration. Means told Prosser-Strong that either Dolan or Kirkland
13 had problems with the arbitrator that Prosser-Strong and Assistant County Manager Reynolds
14 selected. RT 112, L1 11-24.

15 LDF was only going to cover three-fourths of the arbitration costs for Strahan because
16 some of it was outside the scope of his employment, but would cover the full cost of bringing the
17 motion to compel. RT 116, L 2-9.

18 The Sheriff refused to arbitrate by not setting a date and by rejecting the arbitrators that
19 Prosser-Strong and Reynolds had selected. RT 117, L 21 to RT 118, L 11. There is nothing in
20 the collective bargaining agreement that allows employers to decline. RT 120, 2-10.

21 The Association could have appealed LDF's decision to terminate coverage to
22 PORAC/PORAN (Police Officers Research Association of California/Nevada). RT 119, L1 6-
23 13.

24 C. Testimony of Pat Dolan

25 Dolan is an independent contractor for the Washoe County Sheriff and maintains an
26 office in the Sheriff's building. RT 121, L1 14-17; RT 124, L1 7-14. He stated that the Washoe
27 County Sheriff did not reject Strahan's grievance per se but rather objected to the fact that the
28 items were not grieved separately (note: the sheriff's notice of discipline combined them all

1 together) and that the noticed lacked specificity. RT 121, L22 to RT 7; RT 123, L 23 to RT 124,
2 6. See Association Exhibit 3. Dolan and the Sheriff also saw the fact that Strahan also filed a
3 federal lawsuit, which looked to them like he was seeking the remedy through the contract plus
4 other damages. RT 122, L1 16-24.

5 Dolan considers the fact that the Ninth Circuit affirmed Judge McKibben's decision
6 granting summary judgment against Strahan to be the law of the case, and he would not have
7 sought to compel arbitration. RT 127, L 22 to RT 128, L 16.

8 D. Testimony of Mark Kilburn

9 Mark Kilburn was solely asked about his contact with Strahan and Strahan's attorney.
10 He never met Strahan, and only spoke with him to get the name of Strahan's attorney.

11 E. Testimony of John Patrick Spencer

12 Lieutenant Spencer has been president of the Association since June 2003, and has
13 known Strahan since 1985. They are friends. RT 138, L1 7-22. RT 139, L1 5-7.

14 The Association has never pursued a grievance to arbitration, in this or any other matter.
15 RT 139, L1 22-25.

16 Strahan told Spencer about Strahan's lawsuit and that he intended to get the demotion
17 overturned in Court. RT 140, L 22 to RT 141, L 12. Strahan felt he was constructively
18 terminated by the demotion/transfer. RT 141, L 19 to RT 142, L 1.

19 Spencer did not officially know what the status of Strahan's grievance was prior to
20 arriving to the hearing, but assumed as did others that the matter had been adjudicated through
21 the federal courts. RT 142, L1 11-25.

22 **FINDINGS OF FACT**

23 1. Until his retirement in 1999, Complainant was a local government employee as
24 defined by NRS 288.050, being an employee of the Washoe County Sheriff's Office.
25 Complainant's retirement is the result of the demotion and punitive transfer effected by Washoe
26 County.

27 2. Respondent is an organization as defined by NRS 288.040 and is the exclusive
28 representative and bargaining agent of the class of employees to which Complainant belonged at

1 the time of his demotion.

2 3. Respondent and Washoe County were at all times relevant herein parties to
3 collective bargaining agreements.

4 4. Complainant was demoted by the Washoe County Sheriff's Office from sergeant
5 deputy sheriff to deputy sheriff and reassigned to a new work location on or after December 15,
6 2005 and had other discipline imposed on him as a result of allegations that he violated various
7 laws of the State of Nevada and orders of the Washoe County Sheriff's Office.

8 5. Complainant grieved his demotion and the other discipline with the assistance of
9 Respondent.

10 6. The Washoe County Sheriff's Office refused to arbitrate Complainant's
11 grievance.

12 7. Respondent did not bring an action in state district court to compel the Washoe
13 County Sheriff's Office to arbitrate Complainant's grievance.

14 8. At or near the time the grievance was initiated, the Washoe County Sheriff
15 threatened Respondent's board members that they would "have to answer for it" were they to
16 follow through on the grievance.

17 9. The foregoing threat was a cause for Respondent's failure to bring an action in
18 district court to compel arbitration.

19 10. Respondent's agents, the Legal Defense Fund and May Prosser-Strong had not
20 continued efforts on behalf of Strahan until as late as June of 2001.

21 11. Respondent first advised Complainant that it was not pursuing his matter any
22 further by letter dated March 19, 2003.

23 12. Respondent failed to explain to Complainant its reason for not compelling
24 arbitration.

25 13. Respondent's purported reason for not compelling arbitration was that the issues
26 subject to arbitration had been decided in the first federal district court matter.

27 14. The first federal district court matter decided that there was an insufficient basis
28 for the civil rights claims (e.g., violation of Complainant's freedom of association, right to due

process) against Washoe County and Sheriff Kirkland before it and that the defamation claim before it did not give rise to a federally protected right.

15. In the Second Judicial District matter, Judge Elliot entered an order dismissing Complainant's complaint therein as to Respondent based on the collateral estoppel effect of the first federal district court matter. However, no proof has been provided to the Board that Judge Elliot's order has itself become a final judgment for collateral estoppel purposes, i.e., that either no timely appeal has been taken or an appeal has been denied.

16. The issue in the grievance was whether Complainant was guilty of the acts he was charged with in the disciplinary proceeding.

17. No court has had before it, as does this Board, Complainant's prohibited practice claim under NRS Chapter 288.

CONCLUSIONS OF LAW

1. The Local Government Employee Management Relations Board ("the Board") has jurisdiction over this matter, as the dispute is between a local government employee and an employee organization and alleges prohibited practices under NRS 288.270/breach of a duly recognized employee organization's duty to provide fair representation to its members. Although the employee in question had "retired" as of the time of initiating this matter, the Board retains jurisdiction insofar as the retirement is the result of a coercive effects of a prohibited practice under Chapter 288.

2. The Board may not consider any complaint filed more than six months after the complainant should have known of the occurrence which is the subject of the complaint. NRS 288.110(4), McElrath v. Clark County School District, EMRB Case No. A1-045634, Item No. 423, p. 1 (February 12, 1988).

3. Complainant, having filed the Complaint herein within six months after learning of the occurrence which is the subject of the complaint (a letter from Respondent informing him that his grievance would not be pursued) is not barred by the statute of limitations from pursuing his breach of duty of fair representation claim.

4. Issue preclusion occurs where an issue of fact or law was necessarily and actually

1 litigated in a prior proceeding that has proceeded to final judgment on the merits from which
2 appeal options have ended or been exhausted. It only applies to litigation of an issue identical to
3 that which was litigated in a prior proceeding. Even if available, application of issue preclusion
4 lies within the sound discretion of the trier of fact. *State, University Community College System,*
5 *v. Sutton*, 103 P.3d 8 (Nev. 2004).

6 5. Without any proof that the order of Judge Elliot in the Second Judicial District
7 Court has become a final judgment, this Board is without discretion to give it issue-preclusive
8 effect as to the collateral estoppel of the first federal district court proceeding.

9 6. Claim preclusion, in its furthest reach, applies only where the claim could have
10 been litigated in the prior proceeding. *Cf. University of Nevada v. Tarkanian* 110 Nev. 581, 600,
11 879 P.2d 1180, 1192 (1994)(The modern view is that claim preclusion embraces all grounds of
12 recovery that were asserted in a suit, as well as those that could have been asserted, and thus has
13 a broader reach than collateral estoppel.)

14 7. Respondent has not established that Complainant could have properly asserted a
15 prohibited practices complaint under NRS Chapter 288 in Federal District Court. Therefore,
16 there is no claim preclusion.

17 8. The doctrine of election of remedies only applies to the election of inconsistent
18 remedies. *J.A. Jones Constr. Co. v. Lehrer McGovern*, 120 Nev. 277, ___, 89 P.3d 1009, 1017
19 (2004). There is no basis for application of that principle here.

20 9. The duty of fair representation requires that when the union represents or
21 negotiates on behalf of a union member, it must conduct itself in a manner that is not "arbitrary,
22 discriminatory, or in bad faith." *Weiner v. Beatty*, 116 P.3d 829, 833 (Nev. 2005).

23 10. The failure of Respondent to bring an action to compel arbitration of
24 Complainant's grievance was arbitrary and in bad faith, based on its fear of incurring the wrath
25 of the Sheriff. Further, the failure of Respondent to give Complainant notice that it would not
26 seek to compel arbitration until after it became largely an empty remedy was arbitrary, and in
27 bad faith.

28 11. Under the circumstances, for this Board to order restoration of the benefit denied to

1 Complainant by the breach of the duty of fair representation, i.e., a good faith exercise of
2 Respondent's discretion in representing Complainant by bringing an action to compel arbitration,
3 is no longer a realistic remedy, nor justified.

4 12. The Board has authority to award attorney's fees and costs to the prevailing party.
5 Because the Complainant is the prevailing party, the Board having found that Respondent has
6 committed a prohibited practice and acted arbitrarily and in bad faith, the Complainant is
7 awarded attorney's fees and costs. The inability of this Board to order a more meaningful award
8 is due to the Respondent's own conduct.

9
10
11 **DECISION AND ORDER**

12 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that

13 1. Respondent is guilty of a prohibited practice, specifically, a breach of the duty of
14 fair representation.

15 2. Complainant is entitled to reasonable costs, including attorney's fees, to be
16 established on supplemental motion by billing records supported by affidavit of Counsel.

17 DATED this 1st day of February, 2006.

18 LOCAL GOVERNMENT EMPLOYEE-
19 MANAGEMENT RELATIONS BOARD

20 BY: Tamara E. Barengo
21 TAMARA E. BARENGO, Chairman

22 BY: John E. Dicks
23 JOHN E. DICKS, ESQ., Vice-Chairman

24 BY: Janet Trost
25 JANET TROST, ESQ., Board Member
26
27
28